

In the United States District Court  
for Southern District of Ohio, Eastern Division

**RICHARD COOEY**

#194-016

Ohio State Penitentiary  
878 Coitsville-Hubbard Road  
Youngstown, Ohio 44505,

Plaintiff,

CASE NO. 2:08-cv-747

JUDGE FROST

MAGISTRATE JUDGE ABEL

vs.

**TED STRICKLAND, Governor**

State of Ohio  
77 South High Street, 30<sup>th</sup> Floor  
Columbus, Ohio 43215,

**TERRY COLLINS, Director**

Ohio Dept. of Rehabilitation & Correction  
1050 Freeway Drive North  
Columbus, Ohio 43229,

**This is a death penalty case.  
Execution scheduled on  
October 14, 2008.**

**PHIL KERNS, Warden**

Southern Ohio Correctional Facility  
1724 State Route 728  
Lucasville, Ohio 45699

Defendants.

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**Richard Cooley's Motion Opposing Defendants' Motion to Dismiss**

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On September 9, 2008, Defendants moved to dismiss the present lawsuit. Defendants claim that Richard Cooley (Cooley) has caused the medical conditions upon which he relies to contest his execution. Further, Defendants claim that Cooley's suit is barred by the applicable statute of limitations. Both assertions are not well-founded. Instead, Defendants' arguments are an effort to avoid the real issue, that Defendants' "one size fits all" protocol fails to comply with the Eighth

Amendment and the Ohio Revised Code. Cooley's reasons opposing Defendants' request are outlined in more detail in the attached Memorandum in Support.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

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### **Memorandum in Support**

#### ***I. Defendants obligated to craft protocol that comports with Constitution & Revised Code***

Defendants would have this Court dismiss Cooley's suit because he "has eaten and medicated himself into a 'new' claim." (Dkt. 11, p. 3) Defendants continue, "[t]his would invite plaintiffs to engage in behavior that is potentially detrimental to them in the hopes of reviving their time-barred claims." (*Id.*) Defendants' argument invites this Court to shift blame to Cooley for Defendants' constitutionally deficient execution protocol. The constitutional responsibility is Defendants' alone:

- Cooley is not responsible for the fact that Defendants' executioners detected poor peripheral veins when they prepared to execute him in 2003;
- Cooley is not responsible for the that fact Defendants restrict him to prison food and commissary junk food and deny him adequate exercise<sup>1</sup>;
- Cooley is not responsible for the medication Defendants' doctors prescribed him;
- Cooley is not responsible for Defendants' failure to craft a constitutional protocol that provides for consideration of the individual inmate the State intends to execute.

While it might grab headlines and make for the good butt of a joke, a fat man has the same right to a constitutional and lawful execution as does a thin man. Regardless of why vein access may be problematic, or why an anesthetic may not have its intended effect, it is the Defendants' obligation to craft a protocol that comports with the Eighth Amendment and the Ohio Revised Code. There are 184 men and women on Ohio's death row. Defendants' intransigence invites more lawsuits as long as Defendants blindly embrace their "one size fits all" protocol. If Defendants do not prescribe the same type and dosage of medication to all inmates with heart problems or cancer, then why do they think the same drugs administered in the same way will have the same effect for every condemned inmate?

Defendants know there are problems with their protocol with respect to vein access; by all accounts, Ohio leads the nation in botched executions. As a result, Defendants are well-aware that their existing protocol does not provide for the appropriate procedures for accessing the condemned's veins. This was evidenced in Joe Clark's execution—the Defendants encountered problems accessing his veins during the course of the execution. (See Dkt. 2, para. 24 and Ex. E attached thereto; Dkt. 8, p. 6) Despite the Defendants' subsequent enactment of two new protocols, Defendants again experienced problems accessing Christopher Newton's veins during his execution. (See Dkt. 8, p. 7 and Ex. 1 attached thereto)

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<sup>1</sup> Until recently, Cooley was housed in the Supermax portion of the Ohio State Penitentiary, confined to a cell 23-hours a day.

Cooley initiated this lawsuit to require Defendants to address, prior to his execution, the problems experienced by Clark and Newton. On June 19, 2008, Cooley placed Defendants on notice as to the physical conditions unique to him that increase the likelihood that Defendants will, once again, experience vein access problems, as well as problems with the drugs that they use in the execution procedure. (See Dkt. 2, para. 21 and Ex. F attached thereto) Defendants have never responded to Cooley concerning these issues. Defendants' failure to address these issues, after Cooley placed them on notice as to his unique medical conditions, borders on unconstitutional, deliberate indifference. Nelson v. Campbell, 541 U.S. 637, 645 (2004) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment").

## ***II. Cooley did not create the problems with Defendants' protocol***

Cooley has a history of compromised veins. (See Dkt. 2, paras. 15-17 and Exs. D and E attached thereto) His weight only creates a possibility that his compromised veins may be even more difficult to access. (See Dkt. 2, para. 17) Consequently, it is not Cooley's eating that has caused a potential problem with his execution, but the Defendants' failure to enact a protocol that enables it to execute an individual with compromised veins in a manner that comports with the Eighth Amendment and the Ohio Revised Code. Moreover, how Cooley came to his present condition is irrelevant to the inquiry—the United States Supreme Court has concluded that regardless of how the condition arose, all inmates are entitled to an execution that comports with the constitution. Cf. Nelson v. Campbell, 541 U.S. 637, 640 (2004) (allowing petitioner's § 1983 lawsuit to proceed despite the fact that he caused his "severely compromised peripheral veins, which are inaccessible by standard techniques for gaining intravenous access, such as a needle" through "years of drug abuse").

Defendants' arguments concerning Cooley's migraines fare no better. Instead of claiming that Cooley has manufactured his migraines, as Defendants did with his compromised veins, Defendants fault Cooley for the medication that he is taking to relieve the pain from his migraines. But Cooley has no say in the drug that he is taking for the migraines. It was Defendants' employees, trained medical personnel at the Ohio State Penitentiary, who selected the proper course of treatment. Defendants' contention that DRC is not "force-feeding or medicating" Cooley is nothing short of offensive. (Dkt. 11, p. 3) Defendants would have Cooley forego medical treatment recommended by its own employees rather than adjust their protocol to comport with the Constitution and the Ohio Revised Code. Would Defendants recommend Cooley stop seizure medication, diabetes treatment, heart medication?

In addition, Defendants have yet to disclose Cooley's current medical records, which he asked for on May 22, 2008. (See Dkt. 2, para. 13 and Ex. D attached thereto) Resultantly, Defendants have precluded Cooley from fully developing the evidence concerning the manner in which Ohio's "one size fits all" lethal injection protocol will cause Cooley pain and suffering. Cooley's medical condition, like all individuals, is constantly evolving. Based on Cooley's current medical condition, which is unavailable to counsel, the risks posed to Cooley could be more serious than even he knows.

### ***III. This litigation is not barred by the statute of limitations***

Defendants also argue that Cooley's suit is barred by the statute of limitations as interpreted by the Sixth Circuit in Cooley v. Strickland, 479 F.3d 412 (6<sup>th</sup> Cir. 2007). Defendants fail to recognize that Cooley's challenge in the present case is much different than his earlier challenge, and is therefore not barred by the Sixth Circuit holding in Cooley.

***A. Cooley's present challenge is to an un-announced execution procedure***

Cooley's prior litigation involved Defendants' protocol as applied to all inmates on Ohio's death row. It was premised upon an individual not having any special physical or medical conditions. As is now apparent, Cooley suffers from atypical physical or medical conditions. He suffers from compromised veins. In addition, he is taking medication that may affect the drugs that Defendants plan to administer to him during his execution.

When it resolved the initial litigation, the Sixth Circuit found, as early as 1991, that Ohio's death row inmates had sufficient information to raise challenges to Ohio's lethal injection procedures. *Id.* at 422. This is not the situation for an individual that suffers from the atypical conditions that Cooley suffers. Defendants' lethal injection protocol has never contained a "cut down" procedure (or any alternative peripheral-vein IV placement) for those individuals who have compromised veins. Defendants' lethal injection procedures have never contained a provision or procedure for those individuals who may not be rendered sufficiently unconscious by the administration of sodium thiopental. Defendants still have not indicated (even now with less than a month until the scheduled execution) how they intend to gain venous access if Cooley's peripheral veins are inaccessible.

***B. The present litigation, based on atypical medical conditions, raises different challenges***

Defendants ask this Court to dismiss this litigation for the same reason that the Sixth Circuit disposed of Cooley's frontal attack on Ohio's lethal injection lawsuit in Cooley. (Dkt. 11, p. 2) Defendants assert that the two suits state the same claim. (*Id.*) While the suits are similar, they are not identical. Cooley is not arguing that Ohio's lethal injection protocol is unconstitutional on its face, as he argued in his first suit. Rather, he is arguing that, as applied to him, and as a result of his atypical medical conditions, Defendants' current lethal injection protocol will result in an inhumane execution violating both the Eighth Amendment and the Ohio Revised Code.

Defendants also argue that Cooley's Topamax-related claim is identical to the claim that he raised in his prior appeal. Defendants argue that Cooley's current argument is an "extension" of his earlier argument that "if the first drug in the protocol was improperly administered, there was a risk that he might suffer pain or discomfort." (Dkt. 11, p. 5) Cooley's claim, however, is not "contingent upon maladministration." (See id.) Rather, Topamax itself places him at risk for an execution violative of the Eighth Amendment and the Ohio Revised Code. (See Dkt. 2, para. 18) Resultantly, "Mr. Cooley's ongoing exposure to Topamax may decrease his sensitivity to barbiturates, including thiopental," which is the first drug administered by Defendants during Ohio's lethal injection process. (Id. at 2)); id. at para. 19 ("Further, "Topamax also has analgesic (pain reducing) properties, and thus may place Mr. Cooley at increased risk for awareness during the attempted anesthetic component of the lethal injection procedure. (Ex. E, p. 2)").

Any death-sentenced individual could file the first suit filed by Cooley. This is evidenced by the numerous inmates who intervened in that suit, and who continue to remain as litigants in that suit. The present suit, however, only Richard Cooley could file because he relies exclusively on his atypical medical conditions.

### **Conclusion**

This Court should deny Defendants' motion to dismiss and grant Cooley's requested preliminary injunction. In addition, this Court should order the release of Cooley's medical records in order to allow full assessment and review of Cooley's claims.

Respectfully submitted,

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#### **Certificate of Service**

I hereby certify that the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties.

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